

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GREAT AMERICAN INSURANCE
COMPANY, and GREAT AMERICAN
INSURANCE COMPANY OF NEW YORK,

Plaintiffs,

v.

MICHAEL CHANG, d/b/a SUNRISE
CLEANERS, INC., and ROXANNE
CHANG, d/b/a, SUNRISE CLEANERS,
INC.,

Defendants.

) Case No. 12-00833-SC

) ORDER GRANTING THIRD-PARTY
) DEFENDANT'S MOTION TO DISMISS

MICHAEL CHANG, d/b/a SUNRISE
CLEANERS, INC., and ROXANNE
CHANG, d/b/a, SUNRISE CLEANERS,
INC.,

Third-Party
Plaintiffs,

v.

FIREMAN'S FUND INSURANCE
COMPANY,

Third-Party
Defendant.

I. INTRODUCTION

Now before the Court is Fireman's Fund Insurance Company's ("FFIC") motion to dismiss and/or strike Michael and Roxanne Chang's (collectively, "the Changs") Amended Third-Party Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 41(b). ECF No. 53 ("Mot."). The Motion is fully briefed, ECF Nos. 56 ("Opp'n"), 58 ("Reply"), and appropriate for determination without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons set forth below, the Motion is GRANTED.

II. BACKGROUND

This case involves an insurance coverage dispute arising from an underlying lawsuit filed against the Changs, Bilal Kartal v. Michael Chang, et al., Case No. CIV 458146, San Mateo Superior Court (hereinafter, the "Kartal Action"). ECF No. 16 ("FAC") ¶ 11. The Kartal action concerns the alleged contamination of a property owned by Michael Chang that is located on Baldwin Avenue in San Mateo, California. Id. ¶¶ 4, 6. The instant action also involves a related insurance dispute arising from claims that Michael Chang asserted in a different litigation in which he sought to recover pollution and investigation costs from the California Underground Storage Tank Fund (the "Storage Tank Fund Action"). Id. ¶ 11.

The Changs tendered the underlying actions to Great American Insurance Company and Great American Insurance Company of New York (collectively, "Great American") for insurance benefits under two policies issued by Great American between 1977 and 1983. Id. ¶ 20. They also tendered insurance claims to FFIC pursuant to policies FFIC issued to the Changs' tenant, Christopher Chang, between 1984

1 and 1987. ECF No. 50 (Amended Third-Party Complaint ("Am. TPC")) ¶
2 12. Great American is defending the Changs in the Kartal action
3 under a reservation of rights and has advanced other claimed
4 amounts, also under a reservation of rights. FAC ¶¶ 12-19. Great
5 American alleges that it has no duty to defend or indemnify the
6 Changs because, among other things, the Changs breached their duty
7 to cooperate under the policies by attempting to manufacture a
8 claim for insurance benefits. Id. at 18.

9 Specifically, Great American points to a 2008 email from the
10 Changs' environmental consultant to the Changs' attorneys,
11 suggesting that the Kartal action did not trigger Great American's
12 duty to defend, but that Great American's duty might be triggered
13 through a cross-complaint filed by third parties. Id. at 53-54.
14 The Changs subsequently filed a cross-complaint in the Kartal
15 action against Christopher Chang and Grace and Kuneo Yamuguchi
16 (collectively, the "Yamaguchis"), whose family had allegedly owned
17 or operated a dry cleaning business at the Baldwin Avenue property
18 since the 1930s. Id. ¶ 57. Great American alleges that the Changs
19 then encouraged Christopher Chang and the Yamuguchis to file cross-
20 complaints against Michael Chang. Id. ¶¶ 59-70. Other emails
21 cited in the FAC indicate that the Changs' attorneys and
22 environmental consultant believed that these cross-complaints would
23 trigger coverage by Great American and FFIC. See id.

24 Great American filed this action (the "Great American Action")
25 against the Changs in February 2012. ECF No. 1. Great American
26 seeks a declaration that it has no duty to defend or indemnify the
27 Changs with respect to the Kartal Action or other pollution claims
28 involving the Baldwin Avenue property. FAC at 43-44 ("Prayer for

1 Relief"). Great American also seeks reimbursement of amounts paid
2 in connection with the Changs' insurance claims. Id.

3 In connection with the Great American Action, the Changs have
4 filed a third-party complaint against FFIC for breach of contract,
5 breach of the covenant of good faith and fair dealing, and
6 declaratory relief. The Changs allege that FFIC breached its
7 insurance agreements in bad faith by refusing to fulfill its duties
8 to defend and investigate contamination at the Baldwin Avenue
9 properties. See, e.g., Am. TPC ¶¶ 21-25. The Changs also allege
10 that FFIC colluded with Great American to suppress the filing of
11 cross-complaints against the Changs that would have triggered
12 coverage under the relevant policies. See id. ¶ 15. Among other
13 things, the Changs seek damages resulting from FFIC's refusal to
14 pay their claims and defend the Kartal Action and the Storage Tank
15 Fund Action, as well as a judicial determination that FFIC has a
16 duty to defend and indemnify the Changs in those actions.

17 FFIC moved to dismiss the Changs' original third-party
18 complaint on the grounds that (1) the third-party complaint was not
19 a proper impleader, (2) the court lacked subject matter
20 jurisdiction, and (3) the Changs failed to meet Rule 8's pleading
21 requirements. ECF No. 45. On January 17, 2013, the Court granted
22 FFIC's motion to dismiss. ECF No. 49 ("Jan. 17 Order").¹ The
23 Court rejected FFIC's impleader arguments but found that subject
24 matter jurisdiction was lacking because the third-party complaint
25 did not raise a federal question and diversity was lacking. Id. at
26 4-6. The Court found that the Changs' assertion of supplemental

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28 ¹ Great Am. Ins. Co. v. Chang, 2013 WL 183976, 2013 U.S. Dist.
LEXIS 7435 (N.D. Cal. Jan. 17, 2013).

jurisdiction presented a closer question due to the allegations concerning collusion between Great American and FFIC, and granted the Changs leave to amend so that they could assert proper grounds for supplemental jurisdiction. Id. at 6-9. The Court declined to reach FFIC's Rule 8 arguments but noted concerns about the clarity and organization of the third-party complaint. Id. at 10.

On February 15, 2013, the Changs filed their Amended Third-Party Complaint against FFIC. FFIC subsequently moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. Alternatively, FFIC moves to strike dozens of paragraphs from the pleading, as well as thirty-nine exhibits attached thereto.

III. DISCUSSION

As third-party plaintiffs, the Changs bear the burden of establishing the propriety of the Court's exercise of jurisdiction. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). The Changs have abandoned their contention that the Court may properly exercise federal question or diversity jurisdiction. See Am. TPC ¶ 1. The reason for this is clear: The Changs' Amended Third-Party Complaint, like their original third-party complaint, presents only questions of state law, and all parties to the third-party complaint appear to be California residents. The only basis for jurisdiction alleged in the Amended Third-Party Complaint is supplemental jurisdiction. See id.

Under 28 U.S.C. § 1367(a), "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are

1 so related to claims in the action within such original
2 jurisdiction that they form part of the same case or controversy .
3 . . . " Supplemental jurisdiction should not be invoked "merely to
4 enable state and federal suits to be consolidated in federal court
5 whenever ordinary notions of judicial economy would make that a
6 desirable result, but instead should be reserved for cases where
7 failure to exercise federal jurisdiction would prevent a party from
8 obtaining justice." Hartford Acc. & Indem. Co. v. Sullivan, 846
9 F.2d 377, 381-82 (7th Cir. 1988). Thus, a district court may only
10 assert supplemental jurisdiction over claims between non-diverse
11 parties when those claims arise out of the "same transaction or
12 occurrence" as the claim over which the court has unquestioned
13 federal jurisdiction. Id. at 382.

14 In its January 17 Order, the Court noted that there was some
15 factual overlap between the Great American Action and the claims
16 asserted in the Changs' initial third-party complaint, since both
17 actions arise out of the alleged contamination at the Baldwin
18 Avenue property. Jan. 17 Order at 8. However, the Court found
19 that this factual overlap was insufficient to support the exercise
20 of supplemental jurisdiction, since the Changs' third-party
21 complaint and the Great American Action concerned different
22 insurance policies and thus distinct transactions. Id. The Court
23 suggested that the Changs' allegations that Great American and FFIC
24 colluded by refusing to file cross-complaints against one another
25 on behalf of their insureds could potentially support the exercise
26 of supplemental jurisdiction. Id. However, as pled in the Chang's
27 original third-party complaint, these allegations were "conclusory
28 and otherwise incoherent." Id. The Court also noted that it was

1 entirely unclear why Great American and FFIC were obligated to file
2 cross-complaints against each other. Id.

3 The Changs have amended their third-party complaint to add
4 more factual allegations concerning FFIC and Great American's
5 handling of the underlying actions. They have also added facts
6 explaining how Great American and FFIC allegedly colluded in
7 suppressing the filing of cross-complaints that would have
8 triggered coverage under the relevant policies. Absent a legal
9 duty to file cross-complaints, the Changs' allegations concerning
10 collusion between Great American and FFIC are irrelevant to the
11 Changs' claims for bad faith and breach of insurance contract.
12 However, it remains unclear why FFIC and Great American had a duty
13 to file cross-complaints. An insurer generally has a right to
14 control the defense of its insured. See James 3 Corp. v. Truck
15 Ins. Exch., 91 Cal. App. 4th 1093, 1105-06 (Cal. Ct. App. 2001).
16 Accordingly, an insurer does not have a duty to prosecute a
17 counterclaim or a cross-complaint on behalf of the insured absent
18 some contractual provision requiring such action. See id. at 1104-
19 06.

20 The Changs have not pointed to provisions in any of the
21 relevant policies that would have required either FFIC or Great
22 American to file cross-complaints in the underlying actions. Nor
23 have they pointed to any authority that would give rise to an
24 independent duty to take such actions. The Changs' only argument
25 concerning FFIC's purported duty to file cross-complaints is
26 circular: the cross-complaints were "standard and expected" and
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1 necessary to trigger coverage under the policies. See Opp'n at 9.²
 2 But the Changs have cited no authority suggesting that FFIC was
 3 required to file cross-complaints merely because the cross-
 4 complaints may have triggered coverage under the Changs' policies.

5 Thus, the Court finds that the Changs have failed to meet
 6 their burden of establishing grounds for the exercise of
 7 supplemental jurisdiction over the Amended Third-Party Complaint.
 8 Since the Court has already granted the Changs leave to amend on
 9 this very same issue once before, it declines to grant leave to
 10 amend again. The Court also declines to address FFIC's motion to
 11 dismiss for failure to state a claim or its motion to strike.

12 13 **IV. CONCLUSION**

14 For the foregoing reasons, the Court GRANTS Fireman's Fund
 15 Insurance Company's motion to dismiss for lack of subject matter
 16 jurisdiction. The Court DISMISSES the Michael Chang and Roxanne
 17 Chang's third-party complaint against FFIC without prejudice to the
 18 Changs' right to bring this complaint in state court.

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20 IT IS SO ORDERED.

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22 Dated: April 15, 2013



23 UNITED STATES DISTRICT JUDGE

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25 ² The Changs also argue that the Court should exercise supplemental
 26 jurisdiction because it previously found that the original third
 27 party complaint was a proper impleader. Id. at 10-11. However, as
 28 the Court stated in its January 17 Order, "when assessing
 supplemental jurisdiction, the issue of whether a party has been
 properly impleaded . . . is not dispositive." Jan. 17 Order at 7
 (citing Galt G/S V. Hapag Lloyd A.G., 60 F.3d 1370, 1374 (9th Cir.
 1995)).